



INTERIOR BOARD OF INDIAN APPEALS

Roger St. Pierre and The Original Chippewa Cree Of The Rocky Boy's Reservation
v. Commissioner of Indian Affairs

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ROGER ST. PIERRE AND THE ORIGINAL CHIPPEWA CREE

OF THE ROCKY BOY'S RESERVATION

v.

COMMISSIONER OF INDIAN AFFAIRS

IBIA 80-52-A

Decided March 30, 1982

Appeal from the decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency whereby the Bureau of Indian Affairs refused to recognize actions of the Chippewa Cree Business Committee which require Bureau of Indian Affairs review or approval because of violations of the Chippewa Cree tribal constitution by tribal officials.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

The jurisdiction of the Board of Indian Appeals is governed by 43 CFR 4.330(a) and (b).

2. Board of Indian Appeals: Jurisdiction

The jurisdiction of the Board of Indian Appeals is not determined by the characterization or descriptive title placed on agency action by the deciding official.

3. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction

The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis.

4. Administrative Procedure: Administrative Review--Appeals--Bureau of Indian Affairs: Administrative Appeals: Generally

The Board of Indian Appeals is bound by statutes, regulations, case law, and principles of judicial self-restraint not to interfere with substantive decisions of the BIA issued under its discretionary authority.

5. Indians: Guardianship--Indians: Trusts

The United States is charged with the responsibility of safeguarding, from both external and internal threats, the political existence of Indian tribes, including protecting and guaranteeing tribal self-government and "the political rights of Indians."

6. Indians: Guardianship--Indians: Trusts

The United States is empowered to apply "all appropriate means" to fulfill its general trust obligations and in the course of doing so, is limited only by principles of trust law and relevant constitutional considerations.

7. Indian Reorganization Act--Indians: Guardianship--Indians: Trusts

Examination of the history, purpose, wording, and structure of the IRA leads to the conclusion that Congress intended to impose a specific trust

responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act.

8. Indian Reorganization Act--Indian Tribes: Constitution, Bylaws and Ordinances--Indian Tribes: Elections--Indian Tribes: Federal Recognition--Indians: Guardianship--Indians: Trusts

The government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the trust responsibility established by the IRA and consequently are "subject to limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." Under the circumstances of this case, the actions and decisions of the BIA comport with the requirements of law.

APPEARANCES: Francis X. Lamabull, Esq., for appellant Chippewa Cree Tribe; James W. Zion, Esq., for appellants Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation; Robert S. Thompson, Esq., Office of the Solicitor, U.S. Department of the Interior, for appellee Commissioner of Indian Affairs. Counsel to the Board: Kathryn Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

Findings of Fact

Appellants seek review of the July 7, 1980, decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of

the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency, rendered on February 25, 1980, and September 7, 1979, respectively. Under these decisions, the Bureau of Indian Affairs (BIA, Bureau) refused to recognize those actions of the Chippewa Cree Business Committee, 1/ as constituted following the 1978 general tribal election, which require BIA review or approval, but would continue to recognize, for housekeeping functions necessary to ensure continuation of ongoing programs, actions of the four Business Committee members and the Tribal Chairman elected in the 1976 general tribal election. These decisions were based upon determinations made by Bureau officials that certain individuals who sought elective office during the tribe's June 7, 1978, primary election did not meet the residency requirements of art. IV, § 2 of the Constitution of the Chippewa Cree Tribe 2/ and, therefore, should not have been certified as qualified candidates by the Tribal Election Board. Because of these errors by the Chippewa Cree Election Board, the Bureau concluded that in the November 1978 general election, unqualified candidates were elected to the Business Committee in violation of the tribal constitution. Therefore Bureau officials refused to recognize the actions of the Business Committee.

1/ Amendment I of the Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, provides that: "The governing body of the Chippewa Cree Tribe shall be known as the 'Business Committee.'" Hereinafter we use the terms, as do the parties themselves, "Business Committee" and "tribal council" interchangeably when referring to the governing body of the Chippewa Cree Tribe.

2/ Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, approved Nov. 23, 1935; amended May 17, 1972.

From the record before the Board, the following appears to be the chronology of events. On June 7, 1978, a primary election was held to select candidates for the November 9, 1978, general election of the Business Committee of the Chippewa Cree Tribe. The primary election (and possibly the ensuing general election) was challenged by Peter J. St. Marks, a Chippewa Cree tribal member. St. Marks pursued his challenge through both tribal and Bureau channels. St. Marks' appeal to the Bureau ultimately resulted in a decision on September 7, 1979, by the Superintendent of the Rocky Boy's Agency. The following excerpts reflect the relevant portions of that decision:

September 7, 1979

Mr. John Windy Boy, Tribal Chairman
Chippewa Cree Business Committee

* * * * *

* * * [T]here has been a cloud over the tribal council because of Mr. Peter St. Mark's allegations of irregularities committed by the Chippewa Cree Election Board. St. Marks, a tribal member, has appealed * * * to both tribal officials and Bureau officials for action on his contentions that the Election Board acted beyond the scope of their authority by certifying and allowing certain tribal members to be candidates both as tribal councilmen and Tribal Associate Judge for the June 7, 1978 Tribal Primary Election. Months have passed and St. Marks still has received no answers from tribal officials.

* * * When the Bureau of Indian Affairs * * * has reason to believe that the tribal government * * * may be acting in violation of its Constitution, a decision must be made whether to become involved, when to become involved, how to evaluate the tribal action, and what to do to correct violations.

We are * * * concluding that Mr. St. Marks has exhausted his tribal administrative and tribal judicial remedies and we are responding to * * * his appeal * * *.

We have reviewed this matter thoroughly because the Bureau of Indian Affairs cannot ignore any information which casts a doubt in the legality of the manner in which tribal elections or decisions are rendered.

* * * We have concluded that the Election Board did not follow the Tribal Constitution's qualifications in certifying people to be candidates for tribal councilmen. [According to] The Constitution and By-Laws of the Chippewa Cree Indians, Article IV - Elections and Nominations, Section 2 - "To be eligible for membership on the Business Committee, candidates must have the following qualifications:"

* * * * *

b) Must have physically resided within the general area which encompasses the main body of the reservation or on any land under the jurisdiction of the tribe for two (2) years immediately prior to the date of the general election.

The Election Board certified certain people to be candidates for tribal councilmen when, in fact, they did not meet all qualifications to become tribal councilmen.

We believe that the following people who were certified by the Chippewa Cree Election Board as constitutionally qualified candidates, in fact, did not meet the constitutional qualifications for tribal councilmen: * * *

1) Bert Corcoran - Mr. Corcoran resided on the reservation for less than a year prior to the primary election. He did not physically reside on the reservation for two years prior to the general election.

2) Paul Eagleman - moved away from the reservation to take employment in Canada. He did not physically reside on the reservation for the two years prior to the general election.

3) Roger St. Pierre - Roger returned to live on the reservation from Billings, Montana either in May or June 1977. He did not physically reside on the reservation for two years prior to the date of the general election.

4) Edward Parisian, Jr. - Mr. Parisian was in graduate school in South Dakota for part of the two years prior to the election. Prior to his attending graduate school, Mr. Parisian lived and worked on the Blackfeet Indian Reservation. Mr. Parisian did not physically reside on the reservation the required two years prior to the general election.

We also concluded that Ted Lamere, Jr. was not constitutionally qualified for a seat on the tribal council because he was in California for several months in the fall of 1977. He did not physically reside on the reservation two years prior to the general election.

The Election Board allowed the electorate to vote on a tainted list of tribal candidates. The votes received by the tainted candidates could have gone to any number of fully qualified candidates and would have materially affected the outcome of the elections.

As shown above there were several people whose names should not have been submitted to the electorate. If only one person was unqualified there still would be a violation of the tribal Constitution and election ordinance and the electorate would be allowed to vote on a tainted list of tribal candidates.

As a result of the Constitutional errors by the Election Board we cannot recognize those actions of the tribal council that require Bureau of Indian Affairs review or approval that are presented to it. This action is effective this date.

In order that the Chippewa Cree Tribal government not totally cease we will recognize the actions of the remaining four councilmen and the Tribal Chairman who were elected in the 1976 General Tribal Election provided that such actions are only those housekeeping functions necessary to insure continuation of ongoing programs.

We recommend that a new election be held as soon as possible to elect four constitutionally qualified councilmen so that the affairs of this reservation can be handled in a legal manner and further that Rocky Boy's Indian Reservation can become a productive and viable reservation.

* * * * *

[/s/] Leo Brockie, Jr.
Superintendent

The Chippewa Cree tribal government formally filed notice of appeal of this decision with the Superintendent of the Rocky Boy's Agency on September 12, 1979, who in turn forwarded the appeal to

the Area Director, Billings Area Office. This was followed on October 9, 1979, by the tribe's request that the Billings Area Director grant an extension of time for filing a brief and to allow settlement of the disputed matter by tribal institutions. Also on October 9, Roger St. Pierre and Joe Big Knife, members of the Business Committee elected in the 1978 general election, filed an appeal with the Billings Area Director. Still another appeal was filed with the Area Director on October 15, 1979, by the Original Chippewa Cree of the Rocky Boy's Reservation. ^{3/} On November 6, 1979, the Area Director granted the tribe's October 9 request for a 60-day extension (i.e., until December 11, 1979). Then, on November 8, 1979, the tribe again requested of the Area Director still additional time for briefing and to allow the disputed matter to be resolved internally through tribal institutions. The Acting Area Director granted this second extension on December 7, 1979, extending the filing deadline for briefs to February 9, 1980. On January 23, 1980, a hearing was held before the Chippewa Cree Tribal Appellate Court in regard to St. Marks' challenge to the 1978 tribal election(s). St. Marks was present and allowed to participate. The appellate court, in a written opinion issued January 28, 1980, denied St. Marks' appeal on procedural grounds. In a brief submitted to the Area Director on February 8, 1980, St. Pierre and Big Knife, for themselves and purportedly on behalf of

^{3/} Appellant Original Chippewa Cree is a nonprofit Massachusetts trust organized under the laws of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, and the State of Montana. All members of the Original Chippewa Cree are tribal members and eligible voters of the Chippewa Cree Tribe. The Original Chippewa Cree had previously filed an appeal with the Superintendent of the Rocky Boy's Agency on Sept. 27, 1979.

the Chippewa Cree tribal government, argued that the decision of the tribal appellate court had rendered the dispute moot. The Area Director was, therefore, requested to take immediate action to overturn the Superintendent's decision of September 7, 1979.

The Billings Area Director issued a decision on February 25, 1980. Relevant portions of that decision follow:

Feb. 25, 1980

Mr. John Windy Boy, Chairman
Chippewa Cree Business Committee

* * * * *

This is to advise you that we are upholding the September 7, 1979 decision of the Superintendent, Rocky Boys Agency. [The] appeal * * * [is] denied.

Superintendent Brockie's decision stipulated that "as a result of the constitutional errors by the election board, we cannot recognize those actions of the tribal council that require Bureau of Indian Affairs review or approval that are presented to it." His action was based on the fact that, "the Election Board certified certain people to be candidates for tribal councilmen when, in fact, they did not meet all qualifications to become tribal councilmen." He further listed the questionable candidates and gave reasons for their questionable status.

* * * * *

On two occasions the Chippewa Cree Tribe's general counsel * * * requested extensions of the appeal period to allow the tribe to resolve the matter. We are advised * * * that a January 23, 1980 hearing was held on Mr. St. Marks' appeal concerning the election. Mr. St. Marks' appeal was denied on procedural grounds. We are convinced that tribal remedies have been exhausted and inasmuch as the extended appeal period expired on February 9, 1980 our action must now be taken.

Inasmuch as the questions about the qualifications of certain tribal council candidates was [sic] not addressed

by the tribal forum nor by the two additional appeals we find it appropriate to deny the appeals.

* * * * *

[/s/] A. A. Baker
Area Director

An appeal of the Area Director's decision affirming the Superintendent's earlier decision was filed on March 24, 1980, with the Area Director who forwarded it to the Commissioner of Indian Affairs. The Acting Deputy Commissioner for Indian Affairs issued a decision on July 7, 1980, relevant portions of which include the following:

Mr. John Windy Boy, Chairman
Chippewa Cree Business Committee

July 7, 1980

* * * * *

We view the tribe's constitution as the primary embodiment of tribal laws and evidence of a delegation of authority from the tribal membership to those responsible for governing the tribe. The tribal officials elected or appointed to positions of authority, therefore, have the responsibility for conducting the tribe's affairs in compliance with the constitution. The qualifications necessary to be a bonafide candidate for the tribal council are set forth in the constitution and to waive or ignore that established criteria is clearly a violation of the constitution and constitutes a breach of those laws adopted by the membership of the tribe.

There is no doubt that the conduct of this election as well as election board and tribal court decisions related to it are strictly internal tribal matters. Nevertheless, our approval of the tribe's constitution makes us a party to the terms of that document. It is our duty, as a party to the constitution, to recognize and deal with the legitimate representatives of the tribe. Additionally, we would

be derelict in our responsibility when we have knowledge that a violation of the constitution's election provisions has occurred and do not advise the tribe for the purpose of bringing about corrective action.

Because of the clear candidacy requirements stated in the constitution and since no evidence has been presented to contradict or disprove the Superintendent's contentions of unsatisfactory residence, we must uphold his decision. Accordingly, the subject appeal seeking a reversal of the decision by the Superintendent, Rocky Boy's Agency not to recognize the results of the June 7, 1978, tribal election is hereby denied. This decision is based on the exercise of my discretionary authority, and it is final for the Department of the Interior. * * *

[/s/] Theodore C. Krenzke
Acting Deputy Commissioner
of Indian Affairs

On August 18, 1980, an appeal was filed with the Interior Board of Indian Appeals by Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation from the July 7, 1980, decision of the Acting Deputy Commissioner. The appeal was docketed by the Board on September 19, 1980, and full briefing privileges allowed. No brief was filed by the Chippewa Cree Tribe.

Contentions of the Parties

Appellants St. Pierre and the Original Chippewa Cree assert the following in support of their appeal from the Acting Deputy Commissioner's decision of July 7, 1980: (1) The Interior Board of Indian Appeals has jurisdiction in that the decision of the Deputy Commissioner is based on an interpretation of law and, therefore, subject to review by

the Board; (2) the decisions in this matter violate the rights of the appellants under the United States Constitution, the Constitution of the Chippewa Cree Tribe, 4/ the Indian Reorganization Act (IRA) (codified in 25 U.S.C. §§ 461-486 (1976)); and the Indian Self-Determination Act (codified in 25 U.S.C. §§ 450-458e (1976)); (3) the decisions of the tribal election board and the tribal courts of the Chippewa Cree Tribe upholding the tribal election of November 1978 are binding on the BIA; (4) the BIA is estopped from refusing to recognize the actions of the tribal council as constituted after the November 1978 general election by virtue of its continued recognition of the tribal council after the November election even though it had notice of purported election irregularities prior to the election; (5) the Superintendent's decision denied appellants due process in that it was made without notice or a hearing for persons and/or entities with a legal interest in the decision; (6) the election irregularities were not such as to support the invalidation of the election or the exercise of any purported authority by the BIA to refuse recognition to the acts of the duly elected tribal council of the Chippewa Cree Tribe; (7) decisions of the Superintendent, Area Director, and Acting Deputy Commissioner were made without proper factual basis and are not supported by substantial evidence; and (8) the decisions constitute impermissible interference by the BIA in the internal affairs of the Chippewa Cree Tribe. Therefore, appellants request that the Board reverse the decision of the Acting Deputy Commissioner of Indian Affairs and enter an order

4/ Supra, n.2.

that BIA officials not interfere with or otherwise fail to give recognition to the 1978 election of the Chippewa Cree Tribe. In the alternative, appellants by separate motion under 43 CFR 4.337(a) assert that there exists need for further inquiry into genuine issues of material facts and, therefore, request the Board to require a hearing by an Administrative Law Judge of the Office of Hearings and Appeals to resolve such issues.

Appellee asserts that: (1) The Interior Board of Indian Appeals lacks jurisdiction over the subject matter of this proceeding in that the decision of the Acting Deputy Commissioner was rendered pursuant to his discretionary authority and therefore is final for the Department; (2) although they have had ample opportunity during the appeals process, the appellants have failed to show that the constitutional infirmities associated with the tribal election did not occur and that because the appellants failed to refute the Superintendent's findings, the findings must be taken as admitted and consequently there is no genuine issue of material fact and appellee is entitled to judgment as a matter of law; (3) the Commissioner's responsibility to oversee the government-to-government relationship between the United States and the Chippewa Cree Tribe authorizes the action taken by BIA in this case; (4) the broad discretionary authority of the BIA in the conduct of Indian affairs authorizes the decisions in this instance; (5) the Secretary's order of November 23, 1935, approving the Chippewa Cree tribal constitution and ordering all officers and employees of the

Department of the Interior to abide by its provisions, made it mandatory that the BIA take the action it did, for to have done otherwise would have been an act in contravention of the tribal constitution and the Secretary's directive; and (6) it would violate the trust responsibility of the United States for the Commissioner to deal, regarding trust assets, with a tribal council which is constitutionally invalid, for to do so would expose the United States to potential liability.

These arguments of the respective parties are addressed in the following analysis.

Conclusions of Law

I. Procedural Motions

Jurisdiction

[1] Appellee moves to dismiss this appeal for lack of jurisdiction on grounds that the decision of the Acting Deputy Commissioner was based on the exercise of his "discretionary authority" and that, pursuant to the provisions of 25 CFR 2.19(c)(1), the decision was "final for the Department of Interior." ^{5/} To be sure, 25 CFR 2.19(c)

^{5/} See Motion to Dismiss dated Oct. 22, 1980; decision of Acting Deputy Commissioner of Indian Affairs, Theodore C. Krenzke, July 7, 1980, at 2.

directly applies to actions by the Commissioner regarding appeals from administrative action:

§ 2.19 Action by Commissioner on appeal.

* * * * *

(c) When the Commissioner renders a written decision on an appeal, he shall include one of the following statements in the written decision:

(1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.

(2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals pursuant to 43 CFR [4.332] and [4.333].

However, this procedural requirement necessitating a ministerial act regarding the format of an agency decision is certainly not to be interpreted as determinative of the substantive issue of the jurisdiction of the Board of Indian Appeals. 6/ Instead, other Departmental regulations specifically govern the appellate process and the jurisdiction of the Board. 7/ The provisions of 43 CFR 4.330(a) and (b) are dispositive of the issue:

6/ The Board does not take issue with the substantive content of section 2.19(c)(1) in that it is a correct statement of law to conclude that a "discretionary decision" of the Bureau of Indian Affairs is not generally reviewable by the Board of Indian Appeals (see 43 CFR 4.330(b)(2)) and because such a decision is not subject to review, it is therefore "final for the Department." (The provisions of 43 CFR 4.330(b) however do permit discretionary actions of the Bureau to be reviewed by the Board in special circumstances not existent in this case.)

7/ The Bureau's regulations regarding administrative appeals explicitly refer to those regulations directly governing the appellate process of the Board. See 25 CFR 1.3 and 2.3(c).

§ 4.330 Scope

(a) * * * These regulations apply to the practice and procedure for (1) appeal to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in Chapter I of 25 CFR, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant * * *.

(b) * * * [T]he Board shall not adjudicate: * * * (2) matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority * * *.

Consequently, the jurisdiction of the Board as challenged here by appellee depends on whether the decision appealed is or is not "discretionary." If it is, the Board does not have jurisdiction and must grant appellee's motion for dismissal.

Was then the decision "discretionary" and who is authorized to decide that question? For the following reasons, we find the Board of Indian Appeals is the proper authority to determine this issue and that the decision itself was not "discretionary." We therefore deny appellee's motion for dismissal.

[2] It is a fundamental principle of judicial procedure that a court has "jurisdiction to determine its jurisdiction." See Charles Alan Wright, Handbook of the Law of Federal Courts, section 16 (2d ed. 1970). As a quasi-judicial tribunal charged with the responsibility of performing objective independent review of agency action, the Board

of Indian Appeals also has inherent authority to determine its own jurisdiction under 43 CFR 4.330(b)(2). Thus, upon appeal to the Board, it is for this tribunal in ascertaining its jurisdiction to determine whether the decision appealed is or is not "discretionary." See Hamel v. Nelson, 226 F. Supp 96, 98 (N.D. Cal. 1963). Because the matter of jurisdiction is both a judicial and a legal question, courts and by analogy the Board, in its quasi-judicial capacity, are not bound by the characterization or descriptive titles placed on agency action by the agency itself. See Ligon Specialized Hauler, Inc. v. I.C.C., 587 F.2d 304, 314 (6th Cir. 1978).

[3] The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis. Accordingly, the Board, as a quasi-judicial tribunal, is specifically qualified, equipped, and authorized to perform such functions. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), the Supreme Court observed that the exception to judicial review of agency action committed to discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), is "a very narrow exception applicable in those rare instances where '* * * in a given case there is no law to apply.'" Purely discretionary decisions then involve situations in which there is no law to apply. Here there is "law to apply" for in this instance the agency action rested on interpretation

of the tribal constitution, section 16 of the IRA, 8/ and general principles of trust law applicable to the specific situation and surrounding circumstances.

[4] The Board then is not precluded from entertaining an appeal from a BIA action or decision merely because the issue has been labeled "discretionary" by the agency. 9/ However, the Board recognizes that its review under these circumstances is limited and that it must exercise extreme care so as to not usurp the properly authorized discretionary authority of the agency. The Board is bound by statutes, regulations, case law, and principles of judicial self-restraint not to interfere with substantive decisions of the agency issued under

8/ "[T]he Secretary's (or his delegate's) construction [of a statute] and his determination as to the extent of his authority thereunder are legal questions subject to judicial review." Suwannee Steamship Co. v. United States, 354 F. Supp. 1361, 1366 (Cust. Ct. 1973).

9/ In Ahtone v. Canan, 8 IBIA 278, 279 (1981), the Board deemed itself obliged to accept the Acting Deputy Commissioner's characterization of final agency action in a tribal election dispute as "discretionary" and "final for the Department." Indeed, the Board did not request nor review the administrative record utilized by the Acting Deputy Commissioner in Ahtone in rendering his decision on the tribal election dispute.

In accordance with the legal principles expressed in this opinion, which were not considered by the Board in Ahtone, it is here concluded that it is not incumbent on the Board to accept the agency's characterization of a matter as discretionary and nonreviewable.

The action taken by the Acting Deputy Commissioner in Ahtone is presently under judicial review. Kiowa Business Committee v. Department of the Interior, Civ. No. 81-386D (W.D. Okla., filed May 25, 1981). By delimiting its holding in Ahtone, the Board does not imply it may have reached a different conclusion on the merits of the case than that of the Acting Deputy Commissioner. Since it did not have the agency record before it, it is even speculative whether the Board would have characterized the disposition in Ahtone as other than a purely discretionary matter.

its discretionary authority. With that caveat in mind, we hold that the decision of July 7, 1980, issued by the Acting Deputy Commissioner of Indian Affairs was not discretionary but rather was based on interpretations of law and consequently, the Board has jurisdiction to hear this appeal. Appellee's motion to dismiss for lack of jurisdiction is therefore denied.

Summary Judgment

Appellee asserts that throughout the administrative appeals process the appellants have failed to refute the Superintendent's findings or offer evidence in regard to the constitutional violations enumerated in the Superintendent's decision of September 7, 1979. Appellee concludes that the constitutional violations are admitted, that no genuine issue of material fact exists, and it is entitled to a judgment as a matter of law. Appellee thus moves for summary judgment.

Under the circumstances of this case, appellee's motion for summary judgment is misdirected. The Board agrees that based on the record, prima facie violations of the tribal constitution have occurred. Appellants, as appellee correctly observes, have never offered proof to the contrary nor in any way attempted to refute

BIA's findings and conclusions regarding the constitutional violations. 10/ In this respect, no genuine issue of material fact exists. However, the case before us concerns the legal authority of the Bureau to take the action it did based on evidence of a violation of the tribal constitution of a tribe organized under the IRA. This is an issue in controversy between the parties and an issue which deserves a judgment on the merits. Therefore, appellee's motion for summary judgment is denied because appellee is not entitled to prevail as a matter of law because a controverted question of law exists as to whether the Bureau has the authority to act as it did based on the given facts of this appeal.

II. Analysis

The actions and decisions of the Bureau of Indian Affairs in this case are justified under its trust responsibility to administer the government-to-government relations between the United States and Indian tribes organized under the IRA. 11/ The following discussion

10/ Even the tribal appellate court decision failed to address the merits regarding the alleged constitutional violations, rendering its decision instead on procedural grounds. See Letter Opinion of the Chippewa Cree Appellate Court, Jan. 28, 1980, denying the appeal of Peter J. St. Marks.

11/ 25 U.S.C. §§ 461-486 (1976); also known as the Wheeler-Howard Act, Act of June 18, 1934, 48 Stat. 984.

Section 16 of the Act (25 U.S.C. § 476 (1976)) provides for the organization of tribal governments and thus serves as the statutory basis for the United States trust responsibility toward those tribal governments organized according to its provisions. Section 16 provides:

examines in detail the general trust relationship ^{12/} involving tribal governments and the United States, and the specific trust responsibility established by the IRA.

The Trust Relationship

"[A]n unbroken line of Supreme Court decisions [exists] which, from the beginning, have defined the fiduciary relationship between

fn. 11 (continued)

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

^{12/} "The courts have used interchangeably the terms 'trust,' 'fiduciary,' and 'guardian-ward' to describe the relationship between the Federal Government and the Indian tribes." Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me.), n.13 at 660, aff'd, 528 F.2d 370 (1st Cir. 1975).

the Federal Government and the Indian tribes as imposing a distinctive obligation of trust upon the Government in its dealings with the Indians.” Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 662 (N.D. Me.), aff’d, 528 F.2d 370 (1st Cir. 1975). In numerous cases, spanning over 150 years of Federal Indian law, the Supreme Court of the United States has established and applied a trust responsibility to the relationship between the United States and the Indian tribes and people. The Supreme Court has recognized that this trust obligation requires the United States to protect Indian sovereignty and political existence, and consequently, it has acknowledged the power and authority necessary to fulfill this commitment. Beginning with the landmark decision of Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-18 (1831), the Court established, as a foundation principle of Federal Indian law, the doctrine of the trust relationship. According to Marshall the unique relationship existing between the United States and the Indians resembled that of a guardian and ward. Furthermore, because Indian tribes were within the territorial and jurisdictional boundaries of the United States and had themselves acknowledged that they were under the protection of the United States and that the United States had the right to manage all their affairs, they were in what could be considered a protectorate status and therefore properly denominated “domestic dependent nations.” 13/

13/ "When a state resigns the control of a part of its sovereign functions to another state, or to other states, it is under a protectorate; the degree of authority exercised by the protecting state varies greatly in different cases." (Footnote omitted.) 48 C.J.S. International Law § 6 (1981).

The following year in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552, 560-61 (1832), Chief Justice Marshall more accurately analyzed and appraised the protectorate status of the Indian nations vis-a-vis the United States. As Marshall explained, under principles of international law, Indian nations under the protection of the United States are afforded protectorate status, and consequently, while their right to self-government is reserved, it is simultaneously protected and guaranteed by the United States. ^{14/}

Fifty years later, in United States v. Kagama, 118 U.S. 375, 381-85 (1886), the Supreme Court reaffirmed the trust relationship and recognized within it the dependency of the Indians on the United States for their "political rights." In elaborating on the trust responsibility, the Court specifically referred to the power and obligations which the trust relationship imposed upon the United States. The Court expanded on these powers and responsibilities in Heckman v. United States, 224 U.S. 413, 431, 434 (1912). The Court reasoned that the fulfillment of the trust responsibility by the United States was a matter of national honor and in the national interest, and that during the period of "guardianship" the United States possessed the power to

^{14/} "The status of a political entity under a protecting state may be that of almost complete independence, or of such dependence as to deprive it of any standing as a person in international law, even though the protected state may have control of its internal affairs." (Footnote omitted.) Wilson, Handbook of International Law at 33 (3rd ed., 1939).

fulfill its trust responsibilities "by all appropriate means." The Court further noted that the United States as trustee could act on behalf of the Indian beneficiary without the Indian beneficiary's prior consent and that furthermore the Indian beneficiary could not interfere with actions of the United States, as trustee, in fulfilling its trust responsibility.

In United States v. Creek Nation, 295 U.S. 103, 109-110 (1935), the Court again reaffirmed that the "property and affairs" ^{15/} of an Indian tribe under "guardianship" were subject to the control and management of the United States. The Court held, however, that the power of the United States as trustee was not absolute, and though it extended to "all appropriate means," it was nevertheless subject to limitations inhering in "guardianship" (i.e., principles of trust law) and "pertinent constitutional restrictions."

^{15/} "It has been established that the trust doctrine is not limited to situations in which the government has retained legal title to the Indian land," Carlo v. Gustafson, 8 I.L.R. 3040, 3042 (D. Alaska 1981), or "to situations in which the government is managing property owned by an Indian tribe," Eric v. Secretary of the United States Department of Housing and Urban Development, 464 F. Supp. 44, 49 (D. Alaska 1978). (In support of these propositions, both Carlo and Eric cite the United States Supreme Court in Morton v. Ruiz, 415 U.S. 199, 236 (1974).)

For an example of the United States acting to protect the tribal government interest of the trust res, see United States v. Pawnee Business Council of the Pawnee Indian Tribe of Oklahoma, 382 F. Supp 54 (N.D. Okla. 1974).

The most definitive description of the trust responsibility arising from the trust relationship was enunciated by the Supreme Court in Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). There the Court held that the United States Government, in its relations with Indians, was charged with moral obligations of the highest responsibility and trust and that its conduct "should therefore be judged by the most exacting fiduciary standards."

[5, 6] These decisions of the Supreme Court regarding the trust relationship of the United States to the Indian tribes and people establish, as a general proposition, the protectorate status of the Indian tribes vis-a-vis the United States and the corresponding powers and obligations of the United States to act for their protection. As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats, the political existence of Indian tribes, including protecting and guaranteeing tribal self-government and "the political rights of Indians." Accordingly, as trustee charged with these responsibilities, the United States is empowered to apply "all appropriate means" to fulfill its general trust obligations and, in the course of doing so, is limited only by principles of trust law and relevant constitutional considerations. The trust relationship is a matter of national honor and its fulfillment in the national interest. Those agents to whom the United States has delegated this duty will be judged by "the most exacting fiduciary standards." Within this general trust relationship we focus our

inquiry next on the specific trust responsibility established by the IRA.

The Trust Responsibility

In Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir.), aff'g 388 F. Supp. 649 (N.D. Me. 1975), the circuit court provided an analytical method for determining whether a specific trust responsibility on the part of the United States exists with regard to a particular Indian tribe. The first circuit cited with approval the reasoning and analysis which the lower court had applied to determine the existence of a trust responsibility between the United States and the Passamaquoddy Tribe. The district court, the first circuit explained, properly examined a series of decisions by the United States Court of Claims involving the trust responsibility of the United States and an extensive body of Federal cases holding that when the Federal Government enters into a treaty or enacts a statute on behalf of Indian tribes, the Government commits itself to a "guardian-ward relationship" with those tribes. Analysis of a statute to determine the existence or nonexistence of a specific trust responsibility, the court of appeals continued, included examination of the history, purpose, wording, and structure of the act. Furthermore, when the trust responsibility is established by a statute, the rights and duties of the trust responsibility are likewise encompassed or created by the statute. When the Government guarantees a right to an Indian tribe by statute, "clearly there can be no meaningful guaranty

without a corresponding Federal duty to * * * take such action as may be warranted under the circumstances" (Passamaquoddy Tribe, supra, 528 F.2d at 379). Once the trust responsibility is so established, it is appropriate, initially at least, for the departments of the Federal Government charged with responsibility in these matters to give specific content to the congressionally declared fiduciary role.

To the extent the fiduciary relationship must be based upon a specific statute, treaty, or agreement, which in turn helps to define and in some cases limit the relevant duties under the trust responsibility, it is appropriate to examine whether the Indian Reorganization Act, and section 16 in particular, establishes a specific trust responsibility on the part of the United States toward tribes organized in accordance with its provisions.

[7] Examination of the history, purpose, wording, and structure of the IRA leads to the conclusion that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act. Review of the legislative history of the Wheeler-Howard Indian Rights Bill, which, when enacted became the IRA, 16/ reveals that on February 19, 1934, John Collier, then Commissioner of Indian Affairs,

16/ Although altered in the course of the legislative process, the Wheeler-Howard Indian Rights Bill essentially was enacted as the IRA. As Congressman Frear explained on June 15, 1934, during the final floor debate regarding the House version of the Act:

"As I understand it, the bill in its earlier form as introduced had the same principles as the bill now awaiting a vote. What have

submitted a memorandum of explanation to the members of the Senate and the House Committees on Indian Affairs. The memorandum, consisting of a narrative description and analysis of the bill as introduced and entitled "The Purpose and Operation of the Wheeler-Howard Indian Rights Bill," ^{17/} explained that the bill, while curbing Federal absolutism, provided Indians with "Home Rule under Federal guidance." As Collier explained: "The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services * * *." Although the bill sought ultimately to eliminate the BIA in the governance of Indian communities, it nevertheless contemplated an advisory role for the Bureau as a special service body. Furthermore, according to the memorandum, it contemplated a transition (i.e., a period of guardianship) while the process of Indian self-determination was effectuated. The Collier memorandum further explained that the bill initially entitled Indian communities to "some self-government"

fn. 16 (continued)

been changed are the details and the mechanisms of the bill, but not the principles of the bill, and that, I understand, is why the President, by personal letter, Secretary Ickes, and Indian Commissioner Collier are urging the pending bill just as earnestly as they favored the original draft."

(Final House floor debate, 78 Cong. Rec. H,11743 (daily ed. June 15, 1934).) See also letter from Commissioner of Indian Affairs John Collier to Congressman Frear dated June 15, 1934, explaining the differences and similarities between the bill as introduced and the final House and Senate versions (reprinted in 78 Cong. Rec. H,11743 (daily ed. June 15, 1934).)

^{17/} Reprinted in "Hearings Before the Comm. on Indian Affairs, U.S. Senate, on S. 2755," 73rd Cong., 2d Sess. 16 (1934) (hereinafter Senate Hearings). Also reprinted in "Hearings Before the Comm. on Indian Affairs, House of Representatives, on H.R. 7902," 73rd Cong., 2d Sess. 15 (1934) (hereinafter House Hearings).

and that they would be entitled to more as they demonstrated their "capacity" to exercise such functions. The Secretary of the Interior could grant such additional powers of self-government as were necessary but in any event, the powers granted by the Secretary were required to contain such provisions for "Federal supervision" as would "assure protection of individual rights and liberties." According to the memorandum, the Secretary would continue to exercise those powers (including those of the "trust responsibility") with which he was then vested. In addition, restrictions imposed on the tribal governments by their charters were to be enforced by either administrative supervision (i.e., the United States as trustee) where so provided by the tribal charter or by judicial proceedings brought by the Secretary or the Commissioner (i.e., the agents of the trustee).

In testimony before the House Committee on Indian Affairs on February 22, 1934, regarding the bill as introduced, Commissioner Collier again emphasized the permanence of the Federal guardianship regarding tribal governments organized under the Act by explaining that, in the event of the failure of tribal governments to fulfill their responsibilities and the revocation by Congress of the tribal charters, the Secretary was to reassume control and responsibility for the administration of tribal government. 18/

18/ See House Hearings, supra at 43. Similarly, in testimony before the Senate Committee on Indian Affairs on Feb. 27, 1934, Collier likewise emphasized that if tribal administrative control failed, then it was to be taken back by the Secretary. (See, Senate Hearings, supra at 32).

In a letter dated April 28, 1934, to the Chairman of the House and Senate Committees on Indian Affairs endorsing the Wheeler-Howard Bill as introduced, President Franklin D. Roosevelt explained that the bill established a new standard for dealings between the Federal Government and its Indian "wards"; that it extended "fundamental rights" of political liberty and local self-government to the Indian community; and that finally, the bill sought to fulfill the "obligation of honor" toward "people dependent upon our protection." 19/

Finally, on June 15, 1934, in the final floor debate regarding the House version of the bill, Representative Howard, the bill's sponsor in the House, succinctly and conclusively stated the purpose of the bill:

Mr. Howard * * *

It may well be asked, What are the ultimate goals of the policy embodied in this bill?

* * * * *

It seeks the functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation, and will progressively reduce and largely decentralize the powers of the Federal Indian Service.

In carrying out this program, the Indian Service will become the adviser of the Indians rather than their ruler. The Federal Government will continue its guardianship of the Indians, but the guardianship envisaged

19/ Reprinted in House Hearings, supra at 8 and Senate Hearings, supra, at 3-4. Cited with approval in Morton v. Mancari, 417 U.S. 535, 542 at n.10 (1974).

by the new policy will constantly strengthen the Indians, rather than weakening them. [20/]

Likewise, examination of the statute itself (i.e., the IRA generally and section 16 specifically) reveals its trust character. As provided by section 16, the administrative role of the Secretary in authorizing and calling special elections in accordance with rules and regulations which he prescribes for the purpose of adopting, ratifying, revoking, or amending the tribal constitutions (see 25 CFR Parts 52 and 53) and approving tribally ratified constitutions and amendments is indicative of the Federal trust responsibility provided by the Act.

Furthermore, although the case law involving the IRA is relatively sparse, 21/ the most definitive statement recognizing the specific trust responsibility established by the Act came from the United States Supreme Court in Morton v. Mancari, 417 U.S. 535, 541 (1974). The Court, in examining the Indian employment preference in section 12 of the Act (i.e., 25 U.S.C. § 472 (1976)), found the trust obligation to be a rationale for the preference: "Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history,

20/ Final House floor debate, 78 Cong. Rec. H,11732 (daily ed. June 15, 1934).

21/ In Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973), the court found that the vast body of case law recognizing the trust obligation was complemented by the detailed regulatory scheme for Indian affairs set forth in Title 25 of the United States Code. The court then cited 25 U.S.C. § 476 (1976) (i.e., § 16 of the IRA) as an example.

has been * * * to further the Government's trust obligation toward the Indian tribes." (Footnotes omitted.)

Based on the preceding analysis, the Board finds that the IRA establishes a specific trust responsibility on the part of the United States with regard to tribal governments organized in accordance with its provisions. 22/ Therefore, inquiry now turns to the specific powers and responsibilities of the United States under that trust responsibility.

The trust responsibility established by the IRA has all the necessary elements of a common law trust--a trustee (the United States), a beneficiary (the Indian tribes and their members), and a trust corpus or res (the tribal governments and their constitutions). See Restatement (Second) of Trusts § 2, Comment H (1959). In administering this trust, the United States and its agents will be held to

22/ Even in the complete absence of the IRA, an argument can be made that based on the general trust relationship, the United States has a trust responsibility in regard to tribal governments per se. The Court of Claims recently concluded in Menominee Tribe of Indians v. United States, 8 I.L.R. 5060, 5062 (Ct. Cl. 1981), that express trust language may not be required to establish an Indian trust, rather an Indian trust may also arise out of other historical sources and a very long course of conduct. It could be argued then that the general trust relationship suffices as just such an historical source and course of conduct and thus establishes a trust responsibility on the part of the United States toward tribal governments. Since we find an express trust responsibility emanating from the IRA, we need not and do not consider this argument.

the most exacting fiduciary standards." Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973). 23/

The Supreme Court has stated that the United States serves in a fiduciary capacity with respect to Indians and is bound to exercise "great care" in administering its trust. United States v. Mason, 412 U.S. 391, 398 (1973). Thus the general standard of conduct for the United States as trustee is "not mere 'reasonableness,' but the highest of fiduciary standards." American Indians Residing on Maricopa-Ak Chin Reservation v. United States, No. 235, slip op. at 14 (Ct. Cl. Dec. 2, 1981); Duncan v. United States, 597 F.2d 1337, 1343 (Ct. Cl. 1979), vacated and remanded, 446 U.S. 903 (1980), on remand, No. 10-75 (Ct. Cl. Dec. 2, 1981). These fiduciary standards in turn are analogous to those governing general fiduciary relationships (Maricopa-Ak Chin, supra; Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980)) if not identical to those of a private trustee (Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973)).

For a more specific determination of the duty and standard of care of the United States as trustee, courts have looked: (1) to the

23/ See also Carlo, supra, at 3042: "In essence, case law makes clear that when Congress provides specific legislation for the benefit of Indians, government officials are held to strict fiduciary standards in implementing that legislation."

source of the specific trust--i.e., the statute, order, executive agreement, or treaty specifically establishing the trust (Passamaquoddy Tribe, *supra*, 528 F.2d at 379; Sac and Fox Tribe of Indians of Oklahoma v. United States, 383 F.2d 991, 1001 (Ct. Cl. 1967); United States v. Seminole Nation, 173 F. Supp. 784, 790 (Ct. Cl. 1959)); or (2) to general principles of trust law to the extent appropriate (Navajo Tribe of Indians, *supra* at 988); or (3) to the specific situation and the surrounding circumstances (Mitchell v. United States, Nos. 772-71, *et al.*, slip op. at 13-14 (Ct. Cl. Oct. 21, 1981)). Thus, as the Court of Claims declared in Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487, 494, *cert. denied*, 379 U.S. 946 (1964): "The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances * * *. That is the standard." (Footnote omitted.)

After the trust responsibility is established, it is appropriate for those departments of the Federal Government charged with executing the trust to determine, initially at least, the specific content of the fiduciary role. Passamaquoddy Tribe, *supra*, 528 F.2d at 379. However, courts and by analogy the Board, in its quasi-judicial capacity, have the authority to review actions of the trustee (see Seminole Nation, *supra*, 173 F. Supp. at 789) and to direct the trustee in regard to the fulfillment of its trust responsibilities. See Harjo v. Andrus,

581 F.2d 949 (D.C. Cir. 1978). In fact, once the trust responsibility is established, there can be judicial establishment of the standard of care owed by the Government under its fiduciary duty. Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1196 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970). And, as the Supreme Court has indicated, "Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts." Mason, supra at 399.

The judiciary's determinations regarding the trust responsibility and the corresponding duties and authority of the United States as trustee include both substantive and procedural matters. See Duncan, supra, No. 10-75 at 14; United States v. Truckee-Carson Irrigation District, 8 I.L.R. 2104 (9th Cir. 1981); Duncan, supra, 597 F.2d at 1344. In United States v. Sioux Nation of Indians, 448 U.S. 371, 415-16 (1980), the Supreme Court suggested standards for judicial review of the Federal Government's actions in regard to control and management of a tribe's affairs under its trust responsibility. The Court explained that such actions were "subject to limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." The Court went on to explain that the question of whether a particular action taken by the trustee was appropriate to the fulfillment of the trust responsibility was factual in nature and the answer must be based on consideration of all the evidence presented. Accordingly,

courts in the course of their review were not to "second-guess from the perspective of hindsight" but rather were to "engage in a thorough-going and impartial examination of the historical record." Presumption of the trustee's "good faith" was not sufficient to advance such an inquiry, the Court concluded.

With the foregoing analytical standards in mind, the Board holds that the government-to-government relations of the United States and the Indian tribes organized under the IRA are governed by the IRA and the specific trust responsibility it engenders. With respect to the case before us then, the Board believes the following disposition is in order.

III. Disposition

The Board concludes that the Bureau fulfilled its substantive and procedural obligations under the trust responsibility of the IRA in that: (1) The Bureau had reasonable cause to believe that a violation of the tribal constitution of a tribe organized under the IRA had occurred; (2) in fact, a prima facie material and significant violation of the tribal constitution occurred; (3) under the circumstances, this violation constituted an imminent and substantial threat to the tribal government (i.e., the trust res) sufficient to justify independent action by the United States (i.e., the trustee) or its agents (i.e., the BIA)) and (4) the action by the trustee or its agents was substantially related to the fulfillment of the specific trust responsibilities

created by the IRA and in accordance with applicable principles of guardianship and pertinent constitutional restrictions.

These conclusions are based on facts found in the record presented the Board, viz.

(1) Peter J. St. Marks' original complaint to the Bureau put it on notice and resulted in the Bureau having reasonable cause to believe a violation of the Chippewa Cree Constitution had occurred; (2) the nature of the specific violations and the fact the appellants failed to offer evidence in refutation leads to the conclusion that a prima facie material and significant violation of the Chippewa Cree Constitution was shown; (3) a constitutional violation of this character, involving as it does the electoral process and the ultimate composition of the tribal governing body, poses a substantial and imminent threat to the integrity of the constitution and the legality of the government of a tribe organized under the IRA and as such warrants independent action by the United States to secure redress; and (4) the actions and decisions of the Bureau taken in response were substantially related to the fulfillment of the trust responsibility which the United States incurred under the IRA in that the Bureau initially sought a tribal remedy and only when a satisfactory tribal remedy failed to materialize 24/ were unilateral actions, narrowly drawn so as to be least

24/ See Patrick Stands Over Bear v. Billings Area Director, 6 IBIA 98 (1977), there actions of BIA officials regarding a tribal election dispute were reversed because the record disclosed that tribal remedies had not been exhausted.

disruptive of tribal sovereignty and self-determination, initiated which in turn were carefully calculated to effectively protect the trust res. Such actions were in accordance with general principles of guardianship and pertinent constitutional restrictions.

Therefore the Board upholds the decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency whereby the BIA refused to recognize actions of the Chippewa Cree Business Committee which require BIA review or approval because of violations of the Chippewa Cree tribal constitution by tribal officials.

Because of our disposition of this case on a theory of the trust responsibility established by the IRA, we need not and do not reach the remaining contentions of the appellee and therefore express no opinion regarding their validity or applicability. However, we do feel compelled to respond specifically to the remaining contentions of the appellants.

Appellants contend that the BIA has no legal authority to act in this case. Clearly the trust responsibility not only authorizes responsive action by the Bureau in this matter, but requires it, 25/ and failure to so act could result, as appellee correctly contends,

25/ Violation of the tribal constitution may well be the most serious legal wrong sufferable by individual tribal members and/or the tribe as an entity. The Board believes that the United States trust responsibility precludes it from furthering, even indirectly, such a wrong

in liability for breach of trust. In Seminole Nation, *supra*, 316 U.S. at 297, the Supreme Court observed:

Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation. If those were the circumstances, either historically notorious so as to be judicially noticed or otherwise open to proof, * * * the Seminole Nation is entitled to recover * * *. [Footnote omitted.]

The fact that the tribe or some of its agencies have been delegated duties by the Federal Government does not exonerate the Government from its trust obligations for the trust responsibilities cannot be delegated away. Eric v. Secretary of the United States Department of Housing and Urban Development, 464 F. Supp. 44, 49 (D. Alaska 1978). Furthermore, the Supreme Court has also held that the United States as trustee has authority to act on behalf of the Indian beneficiary without the beneficiary's prior consent and that the Indian beneficiary cannot interfere with the actions of the United States in fulfilling its trust responsibility. Heckman, *supra*.

fn. 25 (continued)

and that it is incumbent for the United States to take appropriate action in redress. However, measures taken by the trustee in regard to the trust res (*i.e.*, tribal governments and/or their constitutions) must be narrowly tailored so as to be least disruptive of tribal sovereignty and self-determination which are themselves major tenets of the IRA, yet nevertheless effective to fulfill the trust responsibility of protecting the trust res.

The fact that the threat or danger to the trust res emanates from the tribe and/or individual tribal members likewise does not excuse the United States from its trust responsibilities nor restrict its authority to react. Oneida Tribe, *supra* at 498. As was explained in United States v. Camp, 169 F. Supp. 568, 572 (E.D. Wash. 1959):

The Secretary [of the Interior] is charged not only with the duty to protect the rights and interest of the tribe, but also the rights of the individual members thereof. And the duty to protect these rights is the same whether the attempted infringement is by non-members or members of the tribe. [26/] [Emphasis omitted.]

Appellants also contend that tribal sovereignty prohibits BIA interference with internal tribal matters. This case however is not controlled by the doctrine of tribal sovereignty. Instead this dispute is governed by application of the rules and principles of the trust responsibility. The decisions and actions under review here involve the unilateral obligations and authority of the Bureau under the trust responsibility. The Board's review then is not directly concerned with the actions per se of the tribal government. Consequently, the doctrine of tribal sovereignty is not directly applicable. *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (doctrine of tribal sovereignty invoked to protect actions of tribal government). However, neither the doctrine of the trust responsibility nor tribal sovereignty

26/ See also Pawnee Business Council, *supra*, where the United States sought to protect the tribe by enjoining those individual tribal members who had violated the tribal constitution and bylaws and by enforcing the Secretary of the Interior's determinations made in accordance with the tribal constitution.

may be used to undermine the other and it would clearly be improper for the Bureau to invade the legitimate domain of tribal sovereignty under the guise of the trust responsibility. As the court observed in Cheyenne River Sioux Tribe v. Kleppe, 424 F. Supp. 448, 451 (D.S.D.), rev'd on other grounds, 566 F.2d 1085 (8th Cir. 1977), cert. denied, 439 U.S. 820 (1978):

The federal government's trust responsibility is not to be broadly used as an administrative tool to overcome the policy of Indian self-determination.

* * * It seems to this Court that, at the administrative level, the recurrent clashes between the trust responsibility and the policy of self-determination are resolved in a manner detrimental to tribal self-government. All too often, Courts seem to pay little more than lip service to the right and power of Indian peoples to govern themselves. It must be remembered that this right and power is subject to diminution only by express Congressional enactment, not administrative rule-making which under the guise of the trust responsibility seeks to erode what vestiges of Indian sovereignty remain.

Furthermore, any abuse of power by the BIA by improperly interfering with tribal governments and their constitutions would constitute not only a violation of the concept of tribal sovereignty but of the trust responsibility as well (see Logan v. Andrus, 457 F. Supp. 1318, 1330 (N.D. Okla. 1978)). Just as the trustee must protect and safeguard the trust res even from the beneficiary, so too the trustee itself may not invade or threaten the res. Consequently, under its trust responsibility, the

BIA must respect and protect tribal governments and their constitutions. Failure to do so can result in legal and/or equitable relief. 27/

The Board recognizes complications are presented in this case by the fact that under tribal sovereignty, tribes have a unilateral and exclusive interest in their governments apart from their beneficiary interest in the trust res. This fact further exacerbates a situation involving conflicts between the trustee and the beneficiary in regard to the res. However, because the trustee is ultimately held to have legal responsibility for the trust res, it therefore must have ultimate authority to act concerning the res. Therefore, while the BIA does not have independent authority to interfere with tribal governments, which are protected by the doctrines of tribal sovereignty and the trust responsibility, it nevertheless must, as trustee, act to protect and safeguard the res. The BIA's actions in this case are a proper exercise of the trust responsibility and are therefore upheld, the doctrine of tribal sovereignty notwithstanding. 28/

27/ Actions of the BIA contravening tribal constitutions may give rise to Federal court equitable relief (see, e.g., Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), aff'd, 528 F.2d 949 (D.C. Cir. 1978), and Morris v. Watt, 640 F.2d 404 (D.C. Cir. 1981)).

28/ With respect to the relationship between the doctrines of tribal sovereignty and the trust responsibility, the Supreme Court stated in United States v. Wheeler, 435 U.S. 313, 323 (1978):

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." (Emphasis added.)

Appellants further contend that the decisions of the tribal election board and the tribal courts, certifying and validating the tribal election of 1978, are binding on the BIA. The Board rejects this contention to the extent it seeks to limit or restrict the action of the United States as trustee. Neither tribal sovereignty nor the tribal constitution can be invoked to relieve or restrict the trust responsibility of the United States. ^{29/} The tribal constitution and its governmental organization, powers, and procedures are matters of internal or domestic concern to the tribe. As such it has no extraterritorial jurisdiction or external legal effect. Tribal constitutions cannot limit the power of the United States, a superior sovereign, any more than a state constitution could. See United States v. Anderson, 625 F.2d 910, 916 (9th Cir. 1980). That the United States is bound by a tribal constitution would be an especially incongruous result considering that an Indian tribe is not correspondingly bound by the United States Constitution (Talton v. Mayes, 163 U.S. 376 (1896)). ^{30/}

^{29/} Inasmuch as the trust responsibility of the Secretary to protect tribal governments may not be circumvented by the beneficiary, nor delegated away by the trustee, it is no bar to the Bureau's action in this case that the tribal constitution provides at art. IV, sec. 10, that "[t]he Business Committee shall be the sole judge of the qualifications of its members" (Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, approved Nov. 23, 1935).

^{30/} Whatever legal effect the Constitution of the Chippewa Cree Tribe has on the United States Government, it is the result not of the constitution itself, but of the order of the Secretary issued under his own authority and initiative and in accordance with section 16 of the IRA whereby the Constitution and Bylaws of the Chippewa Cree Tribe were approved. See Order of the Secretary of the Interior approving the Constitution and Bylaws of the Chippewa Cree Tribe of the Rocky Boy's Reservation dated Nov. 23, 1935.

Appellants also contend that the BIA should be estopped from refusing recognition of actions of the tribal council as constituted after the November 1978 general election, because of its continued recognition of the tribal council after the November election even though it had notice of purported election irregularities prior to the election. The Board rejects this argument. The facts indicate that the BIA delayed its decision and continued its recognition because Mr. St. Marks was exhausting his appeal through the tribal appellate process. Furthermore, during the course of appeal through BIA channels, the tribe itself requested several extensions of time in order to prepare briefs and allow the matter to be resolved internally by tribal institutions. Finally, as the challenged decisions indicate, the Bureau, for the tribe's own benefit, continued to recognize caretaker actions of the tribal council. Under these circumstances, the Board does not believe the doctrine of estoppel is applicable in this instance and further that it does not warrant superseding the trust responsibility of the United States. 31/

Further, appellants sweepingly contend that the Bureau's decisions in this matter violate their rights under the United States Constitution, the Constitution of the Chippewa Cree Tribe, the IRA,

31/ "It is clear, however, that termination of the Federal Government's [trust] responsibility for an Indian tribe requires 'plain and unambiguous' action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe." Passamaquoddy Tribe, supra, 388 F. Supp. n.15 at 663.

and the Indian Self-Determination Act. Where there is a proper exercise of power and authority under the trust responsibility to protect tribal governments, as has been shown in this case, no such violations of appellants' rights occur.

Appellants' contentions regarding the factual basis of the Bureau's decisions, the sufficiency of the evidence upon which they were based, the seriousness and magnitude of the constitutional violations, and the denial of due process are negated by the findings of a prima facie violation of the tribal constitution resulting in the election of a constitutionally infirm tribal council which thus threatens the legality of the tribal government and the integrity of the tribal constitution in contravention of the IRA. Furthermore, although offered ample opportunity, in accord with due process, during the course of the administrative appeal, the appellants failed to deny or refute the facts, the evidence, or the legal conclusions of the Bureau in regard to the constitutional violations. In essence, there was no genuine issue of material fact before the Board. For these reasons then, the Board denies appellants' alternative motion for a hearing before an Administrative Law Judge of the office of Hearings and Appeals.

[8] By way of summary, the Board holds that the government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the IRA. More specifically,

the actions of the United States with regard to these relations are governed by the trust responsibility established by the IRA and consequently are "subject to limitations inhering in a guardianship and to pertinent constitutional restrictions." Because the BIA had reasonable cause to believe a violation of a tribal constitution of a tribe organized under the IRA had occurred, and because a prima facie material and significant violation of the tribal constitution in fact occurred, and because said violation did constitute an imminent and substantial threat to the tribal government sufficient to justify independent action by the United States, and because said action was substantially related to fulfillment of the trust responsibility established by the IRA and in accordance with applicable principles of guardianship and pertinent constitutional restrictions, the actions and decisions of the BIA in this instance comport with the requirements of law and are therefore affirmed.

Pursuant to the authority delegated to the Interior Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this decision is final for the Department.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Franklin D. Arness
Administrative Judge

//original signed
Wm. Philip Horton
Chief Administrative Judge